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NO.

in the

Supreme Court

of the

United States

October Term, 1984

CARNIVAL CRUISE LINES, INC.,
Petitioner,

vs.

ALBERT KORNBERG and LAURA KORNBERG,
his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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55 pp

QUESTIONS PRESENTED

I.

WHETHER A CLASS ACTION CAN INCLUDE CLASS MEMBERS WHO FAIL TO COMPLY WITH CONTRACTUAL NOTICE PROVISIONS.

II.

WHETHER AN APPELLATE COURT CAN VACATE A TRIAL COURT'S DECISION NOT TO CERTIFY CLASS ABSENT A FINDING THAT THE TRIAL COURT'S DECISION CONSTITUTED AN ABUSE OF DISCRETION.

III.

WHETHER PROVISIONS IN A PASSENGER'S CRUISE SHIP TICKET EXCLUDING A WARRANTY OF FITNESS AND CONDITION OF THE VESSEL ARE VOID AS AGAINST PUBLIC POLICY.

NO.

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CARNIVAL CRUISE LINES, INC.,
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- versus -

ALBERT KORNBERG and LAURA KORNBERG,
his wife,
Respondents.

PARTIES TO THE PROCEEDING

Carnival Cruise Lines, Inc. (Appellee), Albert and Laura Kornberg (Appellants) were parties before the United State Court of Appeals for the Eleventh Circuit. Albert and Laura Kornberg (Plaintiffs) also assert that they represent all passengers on voyage 4206 of the TSS TROPICAL in a class action against Carnival Cruise Lines, Inc.

Carnival Cruise Lines, Inc. (Carnival) does not have any parent corporations and does not have any subsidiary companies which are not wholly owned by Carnival. Fairweather International, Inc., Hamilton Holding Co., Festivale Maritime, Inc. and Carnival Tours, Inc. could be considered as affiliated companies.

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October Term, 1984

CARNIVAL CRUISE LINES, INC.,
Petitioner,

vs.

ALBERT KORNBERG and LAURA KORNBERG,
his wife,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Carnival respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the 11th Circuit entered in this proceeding on September 18, 1983.

OPINIONS BELOW

The Final Opinion of the United States Court of Appeals for the 11th Circuit is reported at 741 F.2d 1332 (11th Cir. 1984) and appears in the Appendix. (App. 1-11).[1]

The decision of the United States District Court for the Southern District of Florida is reported at 1983 AMC 2338 (S.D.Fla. 1983), and is also contained in the appendix. (App. 14)

STATEMENT OF JURISDICTIONAL GROUNDS

This Petition for Writ of Certiorari to the United District Court for the Eleventh Circuit arises from the opinion filed by the 11th Circuit September 18, 1984. (App. 1-11). The suggestion of en banc consideration and petition for rehearing of Carnival Cruise Lines, Inc. was denied on October 29, 1984. This petition for certiorari is being filed within 90 days of that date.

The Petitioner invokes the discretionary jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. and Mrs. Kornberg were passengers on the TSS TROPICALE. The toilets on the ship malfunctioned from time to time during their cruise allegedly causing

[1]Citations to the Petition's Appendix shall be noted by App. followed by a page number. (App. ____).

the Plaintiffs to suffer emotional anguish and depriving them of the pleasures of the cruise. The Plaintiffs filed two class actions in Pennsylvania. These actions were consolidated in federal court and transferred to the Southern District of Florida. These cases were originally filed under diversity jurisdiction (28 U.S.C. § 1332). A federal court would also have jurisdiction of these consolidated cases under admiralty and maritime jurisdiction (28 U.S.C. § 1333).

Prior to transfer, a class consisting of all passengers on the cruise was provisionally certified, subject to decertification pending further discovery. After further discovery, the trial judge made a factual finding that the Plaintiffs claims were not typical of the class of passengers that the Plaintiffs purported to represent.

Unlike the Kornbergs, 92% of the passengers had enjoyed the cruise. Only 3% of the passengers stated that they did not enjoy the cruise. The trial judge also found that only 30 passengers had complied with the ticket contract provision requiring the passengers to file a notice of claim within 185 days. Thus there were insufficient claims to fulfill the numerousity requirements of Rule 23.

The trial judge decertified the class. Later, the trial judge granted a summary judgment in favor of Carnival on the Kornberg's individual claims. The Plaintiffs' ticket from Carnival contained a provision which stated "no undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel."

An appeal followed. The 11th Circuit reversed the trial judge's summary judgment and found the ticket contract provisions to be void as against public policy. The 11th Circuit also vacated the order decertifying the class and remanded the case to the trial court. Carnival's suggestion of en banc consideration and petition for rehearing was denied.

Carnival now petitions the United States Supreme Court for a Writ of Certiorari primarily on the conflict between the 11th Circuit's opinion and clear precedents arising from other circuits.

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE 11th CIRCUIT CONFLICTS WITH THE CLEAR PRECEDENTS OF OTHER CIRCUITS WHICH HOLD THAT A CLASS ACTION MAY NOT INCLUDE CLASS MEMBERS WHO FAIL TO COMPLY WITH NOTICE REQUIREMENTS.

The trial court found that passengers who did not notify Carnival of any claim within 185 days in accordance with their contract requirements could not become class members. *Anschul v. Sitmar Cruises, Inc.*, 67 F.R.D. 455, 456 (N.D. Ill. 1974), appeal dismissed on other grounds, 544 F.2d 1364 (7th Cir. 1976), *cert. denied*, 429 U.S. 907, 97 S.Ct. 272, 50 L.Ed.2d 189 (1976).

The 11th Circuit directly rejected the *Anschul* holding in its opinion thereby creating a conflict with that case. Additionally, other Circuit Courts of Appeal

courts have repeatedly held that a class action cannot be maintained under the Federal Tort Claims Act unless *each* class member has complied with the notice requirements of the Federal Tort Claims Act. *Caidin v. U.S.*, 564 F.2d 284 (9th Cir. 1977); *Lunsford v. U.S.*, 570 F.2d 221 (8th Cir. 1977); *see also Kantor v. Kahn*, 463 F. Supp. 1160 (S.D.N.Y. 1979); 28 U.S.C. § 2675. Thus the 11th Circuit strayed from the rulings of the other circuits in allowing the Plaintiffs in this case to maintain a class suit when the trial court had held that the number of passengers who had given timely notice was too small to warrant class treatment.

The 11th Circuit also found that "there is no essential difference between contractual and statutory limitations." This holding is incorrect.

A statutory limitation period applies to everyone who is in the jurisdiction which has the statute. On the other hand, a contractual limitation only applies to parties to a contract and their privies. No exchange of consideration is made for a statutory limitation whereas there is an exchange of consideration for a contractual limitation. In other words, Carnival was only going to let passengers go on its ship if *each* passenger would notify Carnival within six months if they had a claim for damages. The fact that some other passengers had claims for damages and asserted a class action does not fulfill this requirement. Carnival contracted to know exactly who it was that claimed to be damaged and further contracted to receive *full particulars* about *each* claim.

To some extent, the panel's decision also conflicts with the holding of the First Circuit in *Shankles v.*

Costa Armatori, S.P.A., 722 F.2d 861 (1st Cir. 1983). While this case is not directly on point, that case did reject the attempt of a cruise ship passenger to apply the *American Pipe & Construction Co. v. Utah*, case [414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)] to a cruise ship passenger's claim so as to toll the time for suit provisions in the passenger's ticket contract. It should be noted that in the case at bar, none of the passengers on board the TROPICALE sought to intervene in this action or to bring an individual action as a result of the alleged malfunctioning of the toilet system.

Nothing in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550-551, 94 S.Ct. 756, 764-65, 38 L.Ed.2d 713 (1974) stands for the proposition that all class members need not fulfill prerequisite requirements for filing suit. Additionally, the 11th Circuit's opinion completely misconstrued the *American Pipe* rule which is a "tolling" rule and made it into a "commencement" rule.

Thus, even if *American Pipe* were applicable to this case, the Eleventh Circuit has misconstrued and misapprehended the holding in that case. Certiorari is properly granted when a Circuit Court of Appeals decision seems "to be out of line with the authorities" [*Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 130, 80 S.Ct. 247, 248, 4 L.Ed. 191 (1959)] and where the Circuit Court of Appeals has misapprehended a Supreme Court opinion. [*Schlude v. Commissioner*, 372 U.S. 128, 130, 83 S.Ct. 601, 602, 9 L.Ed. 633 (1963)].

Accordingly, Carnival requests that the court grant this Petition for Writ of Certiorari to consider this matter, particularly in view of the direct conflict between

the 11th Circuit's decision and the decisions of the 7th, 8th and 9th Circuits.

II.

THE DECISION OF THE 11TH CIRCUIT CONFLICTS WITH THE CLEAR PRECEDENTS OF OTHER CIRCUITS WHICH HOLD THAT AN APPELLATE COURT CANNOT DISTURB THE TRIAL COURT'S DECISION REFUSING TO CERTIFY A CLASS ABSENT A FINDING THAT THE TRIAL COURT'S DECISION CONSTITUTED AN ABUSE OF DISCRETION.

Generally, unless abuse is shown, the trial court's decision as to whether a proper class action is brought is final. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1123 (5th Cir. 1969). The 11th Circuit in this case strayed from the long-established precedents of other Circuit Court's in vacating the trial judge's class determination decision.

Nowhere in the 11th Circuit decision is there a finding that the trial judge abused his discretion. The 11th Circuit simply stated that "the reasons of the denial [of class certification] are insufficient." (App. 2) The fact that the 11th Circuit might disagree with the finding of trial judge on the class decertification issue is not enough to warrant vacating the trial judge's order. The Plaintiffs must establish that the exercise of discretion by the district court in denying class certification was *clearly* wrong. *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 468, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978).

The 11th Circuit proceeded to draw different inferences from the same facts which the trial judge already reviewed. It is inappropriate for an appellate court to draw its own conclusions regarding the typicality of the various claims.

> This is so because the issue is one of fact, subject to determination by the district court; it is 'a practical problem', and primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals. Consequently, it is an area in which the trial court must of necessity be granted a wide range of discretion.

Windham, supra, 565 F.2d at 65. The trial judge below made clear that his decision on the typicality issue was primarily a finding of fact, not of law. (App. 18).

The trial judge found that 92% of the passengers had enjoyed the cruise. Only 3% of the passengers stated that they did not enjoy the cruise. (App. 21). Therefore it is clear that the Kornbergs, who allegedly suffered from mental anguish and distress as a result of the cruise, were not typical of the alleged class of passengers on the cruise. It is also clear that the 30 passengers suffering from the cruise were too few to warrant class treatment. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980).

The 11th Circuit action in disturbing the district courts class decertification decision without finding an abuse of discretion conflicts with the rulings of virtually every other circuit court of appeal. The 10th Circuit has held that the class certification determination is a

matter within the sound discretion of the trial court and its conclusions as to whether the class representative has demonstrated that numerosity, commonality, typicality, and adequacy of representation requirements have been met will not be disturbed *absent a showing of abuse of discretion. Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982) *cert. denied*, ____ U.S. ____, 103 S.Ct. 1524, ____ L.Ed.2d ____ (1983).

The rule is the same in the 9th Circuit. *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377 (9th Cir. 1980) *cert. denied sub. nom., Harris, Kerr Foster and Co. v. Spectrum Financial Companies*, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980). The 7th Circuit also requires a showing of an abuse of discretion. *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63 (8th Cir. 1980) *cert. denied*, 449 U.S. 1079, 101 S.Ct. 860, 66 L.Ed.2d 802 (1981). See also Newberg on Class Actions § 2174.

Accordingly, the court should grant this Petition for Writ of Certiorari to determine whether or not the 11th Circuit's opinion has strayed from the established law of the other circuit courts of appeal on this issue.

Additionally, this case presents two important questions of federal procedure in the class action area. This court has previously granted certiorari in cases involving important questions of federal class action procedure. *See, Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed. 2d 511 (1973).

III.

THE DECISION OF THE 11TH CIRCUIT HOLDING PROVISIONS IN A PASSENGER'S CRUISE SHIP TICKET EXCLUDING A WARRANTY OF FITNESS AND CONDITION OF THE VESSEL VOID AS AGAINST PUBLIC POLICY INCORRECTLY DECIDES AN IMPORTANT QUESTION OF FEDERAL MARITIME LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This is an important case of first impression regarding the construction of certain provisions in a passenger's cruise ship ticket contract. The general rule is that conditions and limitations in a contract for passage are valid if the ticket provides adequate notice of them. *Carpenter v. Klosters Rederi*, 604 F.2d 11, 13 (5th Cir. 1979); *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1335 (11th Cir. 1984); 80 C.J.S. Shipping § 182. The validity of the contract provisions were upheld by the trial judge. However, the 11th Circuit has found the provisions to be void as against public policy.

This is an important question of federal maritime law since it effects the validity of passenger tickets all over the United States. Particularly effected are the circuits which have substantial maritime matters before them such as the 2nd, 9th, 5th and 4th and 1st Circuits. Certiorari is properly granted to consider significant questions of admiralty law. *Morales v. City of Galveston, Texas*, 370 U.S. 165, 167, 82 S.Ct. 1226, 1228, 8 L.Ed. 412 (1962); *Salem v. United States Lines*, 370 U.S. 31, 32, 82 S.Ct. 1119, 1121, 8 L.Ed. 313 (1962).

Carnival's position is that the 11th Circuit was incorrect in declaring the warranty of fitness exclusion void as against public policy. However, if there is to be a declaration of public policy made by the court as opposed to a legislative act, Carnival requests that the United States Supreme Court consider this issue rather than simply one panel of an appellate court. The purpose of this consideration would be to maintain the uniformity so important in maritime law.

The Plaintiffs sought damages by reason of the alleged unseaworthiness and lack of fitness of the vessel TSS TROPICALE. Specifically, the Plaintiffs alleged that the toilet flushing system was often inoperable during the cruise which caused them emotional anguish and inconvenience.

The trial court found that the Kornbergs' individual claims were barred by certain ticket provisions. The ticket provisions specifically stated that there was no implied warranty of fitness for the vessel. The ticket also stated that even if there was a breakdown of the vessel, the contract would be fully performed if the Plaintiffs were returned to the port where they got on the vessel.

The trial court noted that the Plaintiffs were unable to cite any authority to show the invalidity of these provisions. On appeal the 11th Circuit found that the provisions were inapplicable to the Plaintiffs' claim. Furthermore, the panel found that a provision stating that "no undertaking of warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel" was void as against public policy.

The 11th Circuit asserted that Carnival had cited no cases upholding such broad disclaimers as involved in this case. However, the courts have upheld numerous exculpatory provisions in cruise ship ticket contract cases. Even the Eleventh Circuit's decision noted that the court's have enforced time limitations for bringing suit and liability limitations regarding damage to luggage. Additionally, many other ticket provisions have been upheld.

In *Desmond v. Holland American Cruises, N.V.*, 1981 AMC 211 (S.D.N.Y. 1981) summary judgment was granted to a cruise line on the basis of a ticket contract provision allowing the cruise line to change its itinerary "for any reason whatever." In *Lohman v. Royal Viking Lines, Inc.*, 1981 AMC 1104 (D.Colo. 1980), a provision exculpating a cruise line for passengers' injuries on land excursions was held valid and not against public policy. A "restraint of princes" clause in a passenger ticket has been upheld. *Halpern v. American Export Lines*, 1952 AMC 114 (N.Y. Trial Court 1951).

The court have also upheld passage contract provisions in certain types of personal injury and medical malpractice cases. In *Cimini v. Italia Crociere International S.P.A.*, 1981 AMC 2674 (S.D.N.Y. 1981), the court upheld a provision in a ticket contract which provided that the ship's doctor was an independent contractor, and thus medical services were at the risk of the passenger. This provision was held to relieve the defendant shipowner from the need to defend a claim for shipboard medical malpractice. *See also, Bowns v. Royal Viking Lines*, 1977 AMC 2159 (S.D.N.Y. 1977).

As can be seen from the list of cases cited above, the construction of provisions in passenger ticket contracts is a recurrent and significant problem in admiralty litigation. The 11th Circuit's opinion strays from the general rule of the validity of such provisions since there was no finding of insufficient notice in the ticket. Therefore, it would be appropriate for the court to review the 11th Circuit's opinion.

The only case cited by the 11th Circuit in support of its contention that the exclusion of warranty of fitness provision was against public policy was the case of *Liverpool and G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 9 S.Ct. 469, 32 L.Ed. 738 (1889). The 11th Circuit misapprehended and misconstrued this case since it is not applicable to the case at bar. It is not a passenger ticket case nor does it involve passengers at all. It is a case involving the carriage of goods by sea and discusses the types of provisions that can be put in a bill of lading. The case is not only inapplicable to a cruise ship ticket case, but the case has been rendered moot by the passage of the Carriage of Goods by Sea Act (46 U.S.C. § 1300-1315) in 1936.

The Plaintiffs also alleged that the TROPICALE was unseaworthy. The 11th Circuit properly found that the Plaintiffs' had no claim for unseaworthiness. The 11th Circuit thus determined that the exclusion of warranty of seaworthiness, etc. was inapplicable. The 11th Circuit ignored the fact that in addition to excluding a warranty for seaworthiness, the clause also excluded a warranty for fitness or condition of the vessel. Thus the clause was clearly applicable.

It is inappropriate in any event for the 11th Circuit to make a determination of public policy regarding cruise ship tickets when the legislature had already spoken. As was mentioned in the 11th Circuit's opinion, the Congress has determined [46 U.S.C. § 183(c)] that a contract provision purporting to limit a ship's liability for negligence to its passengers is invalid. This invalidity applies to personal injury or wrongful death cases. Congress did not invalidate exclusion of warranty of fitness clauses, particularly where no personal injury or wrongful death was involved.

The specific reference to one thing implies exclusion of another. (*Expressio unius est exclusio alterius*). Therefore, Congress has preempted this area and the appellate court should not create a public policy where the legislature has not established one. Alternatively, if there is to be a determination of public policy, the policy should be created by the U.S. Supreme Court rather than simply one circuit court of appeals.

The need for this type of contract provision can be found in a case cited by the 11th Circuit itself. "It is the duty of the common carrier by water to provide its passengers with comfortable accommodations . . . unless there is a contract to the contrary . . ." *Defrier v. The Nicaragua*, 81 F. 745 (S.D. Ala. 1897). (Underlining added). (App. 2) In this case Carnival provided a contract to the contrary. The 11th Circuit found that contract void as against public policy. This is a question of importance involving the uniformity of federal maritime law and should be settled by this court.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the 11th Circuit.

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DATED: December 7, 1984.

CERTIFICATE OF SERVICE

I, RODNEY EARL WALTON, being over the age of 18 years, hereby certify that I have this 7th day of December, 1984, served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on William Alper, Esq. 4601 Ponce de Leon Boulevard, Suite 310, Coral Gables, Florida 33146 and Joseph Weiner, Esq., Freedman & Lorry, 800 Lafayette Building, Philadelphia, Pennsylvania 19106 by mailing said copies in sealed envelopes, first class, postage prepaid, deposited at the United States Post Office located at One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida.

By: Rodney Earl Walton
Rodney Earl Walton

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Albert KORNBERG and Laura Kornberg,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES, INC.,
Defendant-Appellee.

No. 83-5221

United States Court of Appeals
Eleventh Circuit.

Sept. 18, 1984.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and VANCE, Circuit Judges, and SIMPSON, Senior Circuit Judge.

RONEY, Circuit Judge:

Plaintiffs, Albert and Laura Kornberg, filed a class action suit against Carnival Cruise Lines seeking damages allegedly caused by the failure of the sanitary system of the TSS TROPICALE during a one-week cruise in the Caribbean. The district court denied class action certification on the grounds that the class was not sufficiently numerous and that plaintiffs were not typical of the class. On Carnival's motion for summary judgment, the court dismissed plaintiffs' suit as barred by certain disclaimers in their contract of passage. We reverse the summary judgment for a trial on the merits. As to the denial of class certification, we vacate and remand

for further consideration on the ground that the reasons of the denial are insufficient.

Depositions and documentary discovery revealed that the TROPICALE did indeed suffer problems with its sanitary system on the cruise in question as well as on two earlier cruises. The extent and duration of the breakdowns, however, were a matter of dispute. Eighteen percent of the passengers filling out a questionnaire on the TROPICALE complained about the toilets. Plaintiffs' toilet was particularly troublesome, and required individual servicing by the crew.

Plaintiffs alleged diversity of citizenship as the jurisdictional basis of this suit. Since the complained of injury occurred upon a ship in navigable waters, admiralty jurisdiction is also present and maritime law governs the outcome of the suit. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S.Ct. 406, 408 3 L.Ed.2d 550 (1959).

A ship, as a common carrier, owes a special duty to its passengers.

> A contract for passage by water implies something more than ship room and transportation. It includes reasonable comfort, necessaries, and kindness. . . . It is the duty of the common carrier by water to provide his passengers with comfortable accomodations . . . unless there is a contract to the contrary or a fair understanding to the contrary; and the carrier must subject his passengers to no suffering or inconvenience which can be avoided by reasonable care and effort.

Defrier v. The Nicaragua, 81 F. 745 (S.D. Ala. 1897) (cite omitted); *see Chicago, D. & G.B. Transit Co. v. Moore*, 259 F.490 (6th Cir.), *cert. denied*, 251 U.S. 553, 40 S.Ct. 118, 64 L.Ed. 411 (1919); *The Oregon*, 133 F.609, 617-18 (9th Cir. 1904). As an aspect of this duty, the ship's agent must tell prospective passengers when the comfortable staterooms have been filled so that they can make an informed decision on whether they wish to travel in the ship's less desirable accommodations. *Sparks v. The Sonora*, 22 F.Cas. 883, 885 (N.D. Cal. 1859) (No. 13,212).

A breach of the carrier's duty is a "maritime tort." *The Williamette Valley*, 71 F.712, 714-15 (D.C. Cal. 1896); *see The Vueltabajo*, 183 F.594 (S.D. Ala. 1908). A carrier by sea, however, is not liable to passengers as an insurer, but only for its negligence; *Kermarec*, 358 U.S. at 632, 79 S.Ct. at 410; *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 440, 9 S.Ct. 469, 471, 32 L.Ed. 788 (1889). The Ninth Circuit phrased the issue in a case involving ship's accommodations as "whether the officers and agents of the vessel were guilty of negligence in overcrowding her with passengers, in failing to keep the vessel in a cleanly condition, and in failing to supply the vessel and the libelants with a sufficient quantity of wholesome food and provisions for the voyage." *The Oregon*, 133 F. at 618.

Carnival attempts to avoid the duties imposed on a carrier by sea relying on certain disclaimers presented in each passenger's contract of passage. These disclaimers read:

4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel.

14. If the performance of the proposed voyage is hindered or prevented (or in the opinion of the Carrier or the Master is likely to be hindered or prevented) by war, hostilities, blockade, ice, labor conflicts, strikes on board or ashore, Restraint of Rules or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever . . . the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed.
. . .

Paragraphs 4 and 14 contain a disclaimer of liability for negligence, a disclaimer of any warranty of seaworthiness, and a disclaimer of liability for interruption of full performance of the cruise. Each disclaimer will be addressed separately.

As a general rule, conditions or limitations in a contract for passage are valid if the ticket provides adequate notice of them. *Carpenter v. Klosters Rederi*

A/S, 604 F.2d 11, 13 (5th Cir. 1979). Many courts have enforced time limitations for bringing of suit and liability limitations for damage to luggage which were printed on passenger tickets. *See* Anno., Federal View as to Effect of Conditions Appearing on Back or Margin of Passenger's Ticket for Ocean Voyage, 5 ALR Fed. 394. Carnival, however, has cited no cases upholding such broad disclaimers as involved in this case.

Of the three disclaimers, the disclaimer of liability for negligence appears to be the most applicable to this suit. Yet, for good reason Carnival does not rely on this disclaimer. 46 U.S.C.A. § 183c expressly invalidates any contract provision purporting to limit a ship's liability for negligence to its passengers.

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract (1) purporting, in the event of loss of life or bodily injury arising from the negligence of fault of such owner or his servants, to relieve such owner, master, or agent from liability . . .

Id. Even prior to 1936, the year § 183c was enacted, such provisions were held to be void under common law as against public policy. *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 441, 9 S.Ct. 469, 32 L.Ed. 788 (1889).

Carnival relies most heavily on the disclaimer of the implied warranty of seaworthiness. This reliance is misplaced for two reasons. First, the disclaimer does

not pertain to Carnival's traditional duties as a common carrier. Second, if the disclaimer can be construed as a waiver of Carnival's duties it is void as against public policy.

The warranty of seaworthiness is a term of art in the law of admiralty. The warranty imposes a form of absolute liability on a sea vessel. It originally applied to the carriage of cargo and was later extended to cover seamen's injuries. *See generally Mitchell v. Trawler Racer, Inc.* 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960); Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 Mercer L.Rev. 519 (1972). A ship's passengers are not covered by the warranty. *Gibboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975). The disclaimer of the warranty of seaworthiness could not reasonably be interpreted as waiving Carnival's duty to provide adequate accommodations to its passengers when the doctrine of seaworthiness does not apply to passengers. Any claim the passenger plaintiffs have can not be based on unseaworthiness, so any waiver of unseaworthiness would be irrelevant.

Even if Carnival's disclaimer of the warranty of seaworthiness did extend to its duty to provide adequate accommodations to its passengers, the disclaimer would undoubtedly be void as against public policy. A sea carrier's ability to disclaim its responsibilities is not unlimited. As the Supreme Court stated in *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397, 9 S.Ct. 469, 32 L.Ed. 788 (1889):

> [T]he law does not allow a public carrier to abandon altogether his obligations to the public,

> and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment.

129 U.S. at 441, 9 S.Ct. at 472. *See also The Oregon*, 133 F. at 630 (sea carrier cannot avoid liability for its duty to keep ship clean); *Lawlor v. Incres Nassau Steamship Line*, 161 F. Supp. 764, 767 (D. Mass. 1958) (ship which contracts to take passengers on a cruise which stops in various foreign ports cannot disclaim duty to provide safe shuttle service into the ports because such service is an essential part of the voyage).

It should be beyond debate that provision of an adequate sanitary system on a passenger boat is an "essential function" for which a sea carrier cannot disclaim responsibility.

Moreover the act complained of here, a failure to warn, involves negligent conduct and thus under §183c cannot be avoided by contract. In a recent maritime case, this Court discussed whether the law of warranty covers the duty of a manufacturer to warn a purchaser of defects in a product.

> Whatever the merits of adopting a rule that views defects in a product as part of the parties' bargain and thus within the law of sales, it is much less tenable to presume that the buyer has bargained away the manufacturer's obligation to warn of defects that later come to the manufacturer's attention. A duty to warn of a product's defects of which the seller

> becomes aware goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy.

Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813, 818 (11th Cir. 1984). *See* W. Prosser, *Law of Torts* §92 (4th ed. 1971); *cf. Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94-95, 66 S.Ct. 872, 877-878, 90 L.Ed. 1099 (1946) (duty of shipowner to provide seaworthy ship is not created by contract). Although *Miller Industries* involved the law of sales, the principle discussed there would seem to apply with equal force to this case.

The third disclaimer which releases Carnival from its obligation to perform the voyage is clearly not directed at the carrier's duty to provide adequate accommodations. For this reason, we need not address the enforceability of this disclaimer.

Since none of Carnival's three disclaimers apply in this case, the district court erred in granting summary judgment to Carnival.

Denial of Class Action

A federal district court in Pennsylvania, where the action was originally filed, granted a motion for class certification, subject to decertification pending discovery. The case was transferred to the Southern District of Florida on a motion for change of venue. The district court there granted a motion for decertification of the class action on the grounds that it failed to meet Rule 23(a)'s "numerosity" and "typicality" requirements. Fed.R.Civ.P. 23(a)(1) & (2). That decision must be upheld

unless it constituted an abuse of discretion. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038-39 (5th Cir. 1981).

As to numerosity, the district court found that only 30 passengers had complied with the contract provision requiring notice of a claim to be filed within 185 days. Although plaintiff's class action suit was instituted within that period, the district court held that since plaintiffs had no authorization from the other passengers the suit did not operate as notice for these passengers.

The filing of a class action, however, commences the suit for the entire class for the purpose of the statute of limitations whether or not each member of the class is cognizant of the action. *American Pipe & Construction Co. v. Utah*, 414 U.S. 53B, 550-51. 94 S.Ct. 756-65, 38 L.Ed.2d 713 (1974). There is no essential difference between contractural and statutory limitations. Plaintiffs satisfied the numerosity requirement. Contra *Anschul v. Sitmar Cruises, Inc.*, 67 F.R.D. 455, 456 (N.D. Ill. 1974), *appeal dismissed on other grounds*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907. 97 S.Ct. 272, 50 L.Ed.2d 189 (1976), where in a similar situation a district court without explanation distinguished *American Pipe.*

The district court ruled that plaintiffs were not typical of the class because they were more affected by the toilet malfunction than the other passengers. The court noted that plaintiffs' toilet had to be specially worked on and that a large percentage of the passengers failed to complain about the toilets on a questionaire distributed by Carnival. The court thought the

questionaire of particular importance because it revealed that a great many of the passengers had enjoyed the cruise. Reasoning that most of the class had accepted the benefits of the cruise, the court held that this prevented class action treatment.

A class representative's claims or defenses must be typical of the claims or defenses of the class. Fed.R. Civ.P., 23(a)(3). In other words, there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class. *Edmondson v. Simon*, 86 F.R.D. 375, 380-81 (N.D. Ill.-1980); *Senter v. General Motors Corp.*, 531 F.2d 511, 525 n. 31 (6th Cir. 1976), *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.06-2 at 191-192 (2d ed. 1982); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1764 (1972).

Judged by this standard, plaintiffs clearly present claims typical of the class. The cause of action arises from a single event and there is no variation in legal theory. That plaintiffs may have suffered greater damage than other passengers because of the severity of the problem with their toilet does not render them atypical. Differences in the amount of damages between the class representative and other class members does not

affect typicality. *Ouellette v. International Paper Co.*, 86 F.R.D. 476, 480 (D.Vt. 1980). That Carnival may have a stronger defense against many passengers does not render plaintiffs atypical. Plaintiff's claim and Carnival's defenses against that claim are not markedly different than the claims of the rest of the class. *See Irving Trust Co. v. Nationwide Leisure Corp.*, 93 F.R.D. 102, 107 (S.D.N.Y. 1981) (class action by tourists against travel company for hotel switching).

The district court's examination of Carnival's questionnaires may indicate that the class is presently too broadly defined. Some of the passengers may not have been affected by the toilet breakdowns. This, however, simply requires that the class be limited. An acceptance of the benefits by a portion of a class only makes class action treatment inappropriate when the class cannot be divided and thus persons with antagonistic interests would have their rights decided by a single proceeding. *See Crawford v. Texaco*, 40 F.R.D. 381, 385 (S.D.N.Y. 1966).

The district court's orders decertifying the class action and denying class action are vacated and remanded. On remand, the court should determine whether plaintiffs have met the other requirements for a class action listed in Rule 23. *See Long v. Sapp*, 502 F.2d 34, 43 (5th Cir. 1974).

REVERSED in part; VACATED in part and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-1832-Civ-JLK
82-1833-Civ-JLK

(CONSOLIDATED)

ALBERT KORNBERG and LAURA KORNBERG,
Plaintiffs,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

FINAL JUDGMENT

THIS ACTION came on before the Court, the Honorable James Lawrence King presiding, and the Court having granted the Defendant's Motion For Summary Judgment, the issues having been duly considered and a decision having been duly rendered.

IT IS ORDERED and ADJUDGED that the Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendant, CARNIVAL CRUISE LINES, INC., recover of the Plaintiffs, ALBERT KORNBERG and LAURA KORNBERG, its costs of action as hereinafter taxed by the Clerk of this Court.

DONE and ORDERED in Miami, Dade County, Florida, this 9th day of March, 1983.

/s/
JAMES LAWRENCE KING
U.S. DISTRICT COURT JUDGE

Copies to:
Rodney Earl Walton, Esq.
William M. Alper, Esq.
Joseph Weiner, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-1832-Civ-JLK

ALBERT KORNBERG and LAURA KORNBERG,
Plaintiffs,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

**ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court upon Defendant's Motion, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, for the entry of Summary Judgment. The facts of the instant case are as follows: On or about September 11, 1981, the Plaintiffs purchased tickets for a cruise aboard the TSS TROPICALE, and were assigned to Cabin No. 93 on the Empress deck. The ship set sail from Dodge Island, Florida, on January 30, 1982, and returned to the Port of Dodge Island, Florida on February 6, 1982. The Plaintiffs allege that during the cruise "almost every day and for many hours each day, the toilet flushing system aboard said vessel was inoperable, resulting in inconvenience to the passengers. . . ." (Plaintiffs' Federal Complaint Paragraph 12) It is Plaintiffs' position in this action that Defendant is liable to them because of the fact that "the Defendant's officers and employees knew of the conditions which existed and did not take prompt, proper and adequate measures either to correct these

conditions and/or to warn the prospective passengers of the mature (sic) of the condition so that they would have an option of not sailing on the vessel under these circumstances." (Plaintiffs' Memorandum of Law in Reply to Defendant's Motion for Summary Judgment at 2) Plaintiffs, however, have failed to take proper note of the passenger ticket provisions, particularly Paragraphs 4 and 14. Paragraph 4 of the passage contract ticket provides that "no undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness, or Condition of the Vessel." Paragraph 14 provides that "if the performance of the proposed voyage is hindered . . . by . . . breakdown of the Vessel . . . or any cause whatsoever . . . the passenger and his baggage may be landed at the port of embarkation . . . and this contract shall be deemed to have been fully performed." (Ticket contract attached to the Plaintiffs' Answer to Request for Production of Documents dated September 30, 1983) The Plaintiffs embarked from Miami and were, in fact, returned to Miami after the seven-day cruise. Thus, the contract is deemed to be fully performed. It is Plaintiffs' position that Defendant cannot waive its responsibility for the fitness or the condition of the vessel by any provisions of the ticket. Plaintiffs also claim that Paragraph 14 of the passenger ticket is not legally enforceable, and that even if it is enforceable it is not applicable under the circumstances. Plaintiffs, however, fail to provide the Court with any information which might support such a claim. Nowhere in Plaintiffs' Reply Memorandum is any authority to support the proposition that Defendant cannot waive its responsibility for the fitness or the condition of the vessel, or that such provisions are not legally enforceable. Plaintiffs are therefore bound by the terms of the ticket contract including the limitation clauses. *Schwartz v. S.S. Nassau*,

223 F. Supp. 374, 376 (S.D.N.Y. 1963), 345 F.2d 465 (2d Cir. 1965), cert. denied 382 U.S. 919 (1965). Plaintiffs are bound regardless of whether they have read the provisions in the ticket contract. *See Geller v. Horn-America Line*, 201 F. Supp. 508 (S.D.N.Y. 1961), aff'd per curiam, 298 F.2d 618 (2d Cir. 1962), cert. denied 370 U.S. 909 (1962). The Plaintiffs therefore are barred from bringing this action by the provisions of the passage ticket contract. The Court, having considered the argument of counsel and therefore being fully advised, does

ORDER AND ADJUDGE that the Defendant's Motion for Summary Judgment be, and it is, GRANTED.

DONE AND ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 3d day of March, 1982.

/s/
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: Rodney Earl Walton, Esq.
William M. Alper, Esq.
Joseph Weiner, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-1832-Civ-JLK

ALBERT KORNBERG and LAURA KORNBERG,
Plaintiffs,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant.

ORDER DENYING PLAINTIFFS' PETITION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

THIS CAUSE came before the Court upon Plaintiffs' Petition for Certification under 28 U.S.C. § 1292(b). The criteria to be satisfied in certifying a question for interlocutory appeal under § 1292(b) are that the District Court make an "order," and state that it is "of the opinion" that the order (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "that an immediate appeal may materially advance the ultimate termination of the litigation."

With these criteria in mind, the Court turns to an analysis of the instant case. After considerable review of the record, the Court finds that in spite of what Plaintiffs' claim was a decision on the merits, the Court, in its December 12th Order Decertifying the Class, did not decide the merits of this case. Plaintiffs continue to be at liberty to proceed with their individual claims

against the Defendant. Moreover, since many of the questions in this case involve matters relevant only to the instant action, this case will have limited application to other cases. Thus, there is no "controlling question of law." A question is deemed controlling only if it may contribute to the determination, at an early state, of a wide spectrum of cases. *Kohn v. Royall, Koegel & Wells*, 59 F.R.D. 515, 525 (S.D.N.Y. 1973). Additionally, there has not been a sufficient showing that the issues raised admit of "a substantial ground for difference of opinion." The Court's determination that the Plaintiffs' claim was not typical of the other passengers on board the ship was primarily one of fact, not of law. Although Plaintiffs contend that the Court, in making this determination, did not have before it sufficient information and testimony, this is simply untrue. The Court had more than an adequate record upon which to base its finding. Finally, the Court finds that an immediate appeal will not materially advance the ultimate determination of the litigation.

The Fifth Circuit has held that permission to appeal from an interlocutory order should be "granted sparingly, not automatically." *Alabama Labor Counsel v. State of Alabama*, 453 F.2d 922, 924 (5th Cir. 1972). *See also* Wright, Miller and Cooper, Federal Practice and Procedure, § 3929. While there exists, in this case, the possibility of reversal on appeal with the accompanying necessity of a new trial, this possibility is not strong enough to overcome "the strong federal policy against piecemeal appeals." *Vaughn v. Regents of University of California*, 504 F. Supp. 1349, 1355 (E.D. Cal. 1981). The Court, therefore being fully advised does:

ORDER AND ADJUDGE that the Plaintiffs' Petition for Certification Under 1292(b), be, and it is, DENIED.

DONE AND ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 14th day of February, 1983.

/s/

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-1832-Civ-JLK

ALBERT KORNBERG and LAURA KORNBERG, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

CARNIVAL CRUISE LINES, INC.,

Defendant.

ORDER GRANTING MOTION TO DECERTIFY CLASS

THIS CASE came before the Court upon the Motion of the Defendant, CARNIVAL CRUISE LINES, INC., to Decertify Class. As grounds for decertification Defendant alleges, *inter alia*, that Plaintiffs fail to meet the typicality and numerosity requirements contained in Rule 23(a) of the Federal Rules of Civil Procedure. Because different facts are alleged in support of these claims, they will be discussed separately.

(1). **Lack of Typicality**

Plaintiffs have alleged a class action diversity suit for damages based on the alleged malfunctioning of the toilet flushing system aboard the cruise ship TSS TROPICALE. However, the Plaintiffs' claim is not typical of the other passengers, and therefore does not meet

the Rule 23(a)(3) requirement that claims of representative parties be typical of the claims of the class. To begin with, the KORNBERGS' problems were worse than those typically encountered by other passengers. Although some of the passengers aboard the Defendant's ship complaint about the toilets, the KORNBERGS' problems in this regard were worse in that the toilet in the KORNBERGS' cabin had to be worked on to remove lodged material from the toilet system and also needed a new flushing unit.

Second, over 92 percent of the passengers replying to the cruise line's questionaire indicated that they enjoyed their cruise. Only 3 percent answered "No" to the question asking whether they had enjoyed the cruise. Moreover, only 18 percent of the passengers complained about the toilets. Since only 3 percent of the passengers stated that they did not enjoy the cruise, it is reasonable to conclude that many of the 18 percent of the passengers who complained about the operation of the toilets, nevertheless enjoyed the cruise and therefore would not be entitled to a full refund, damages for mental anguish and distress, and punitive damages. As to the 82 percent of the passengers who did not complain about the toilets, it can be assumed either that they suffered no damages or that they accepted the situation. Where it appears that many members of an alleged class have accepted its benefits, a class action is inappropriate. *William Goldman Theaters, Inc. v. Paramount Film Dist. Corp.*, 49 F.R.D. 35 (E.D. Pa. 1969).

(2) **Lack of Numerosity**

The Plaintiffs' claim cannot be certified as a class action because the qualifying class is too small to warrant class status. Although there were approximately 1,400 passengers aboard the ship during the cruise of January 30, 1982 through February 6, 1982, only a maximum of 30 passengers actually qualify for the class. This is because very few passengers complied with the notice provision requiring that any claim be filed in writing within 185 days after the cruise ended. While the Plaintiffs contend that they complied with the notice provisions for all passengers by filing suit within the six-month period provided for notice, this argument is not persuasive because at no time did the KORNBERGS obtain authorization from the other passengers to file notice on their behalf. Since the Plaintiffs lacked authority to act as a representative for the other passengers, they may not use the law suit to fulfill the six-month notice requirement. *See Anchul v. Sitmar Cruise, Inc.*, 67 F.R.D. 455, 456 (N.D. Ill. 1974), *appeal dismissed*, 544 F.2d 1364 (7th Cir. 1976), *cert. denied*, 97 S.Ct. 272 (1976). Thus, the qualifying class can consist of no more than 30 passengers and this is an insufficient number to satisfy the numerosity requirement contained in Rule 23(a)(1). *See Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980). Since the party seeking class action status has the burden of showing that all the prerequisites of class action treatment are present, and since Plaintiffs have failed to show both typicality and numerosity as per Rule 23(a), the class must fail. As this finding is dispositive of the issue of class certification, it is, therefore, unnecessary for this Court to rule on any of the other points raised in the Defendant's Motion. The Court,

having considered the argument of counsel and therefore being fully advised, does

ORDER AND ADJUDGE that the Defendant's Motion for Class Decertification be, and it is, GRANTED.

DONE AND ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida, this 9th day of December, 1982.

/s/

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: Rodney Earl Walton, Esq.
William M. Alper, Esq.
Joseph Weiner, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-1449

ALBERT KORNBERG and LAURA KORNBERG,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

CARNIVAL CRUISE LINES, INC.,

Defendant.

* * *

C.A. No. 82-1536

ALBERT KORNBERG and LAURA KORNBERG,
his wife, Individually and on behalf of all
others similarly situated,

vs.

CARNIVAL CRUISE LINES

ORDER

WEINER, J. JULY 26, 1982

Plaintiff's Motion for Class Certification is GRANTED, subject to decertification pending discovery; the class to consist of all fare paying passengers aboard

the TSS Tropicale during the cruise of January 30, 1982 through February 6, 1982.

Defendant's Motion for Change of Venue to the United States District Court for the Southern District of Florida is GRANTED.

IT IS SO ORDERED.

/s/

CHARLES R. WEINER

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5221

U.S. Court of Appeals Eleventh Circuit

Filed October 29, 1984

Spencer D. Mercer, Clerk

ALBERT KORNBERG and LAURA KORNBERG,
Plaintiffs-Appellants,

vs.

CARNIVAL CRUISE LINES, INC.,
Defendant-Appellee.

**Appeal from the United States
District Court for the
Southern District of Florida**

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion September 18, 11 Cir., 1984, ____ F.2d ____).

Before RONEY and VANCE, Circuit Judges, and SIMPSON Senior Circuit Judge

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

ALBERT KORNBERG and LAURA KORNBERG,
His Wife,
Respondents.

BRIEF OF RESPONDENTS ALBERT KORNBERG AND LAURA KORNBERG, HIS WIFE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in its holding that all class members had complied with contractual notice provisions where the class action was commenced within the 185 days prescribed by the provision in the contract of passage?

2. Was the Court of Appeals correct in its holding that the District Court for the Southern District of Florida was under the circumstances of this case in error in decertifying the class action?

3. Was the Court of Appeals correct in its holdings that the shipowner could not disclaim its liability for negligence and that its disclaimer of the implied warranty of seaworthiness was misplaced since the passengers' claims are not predicated upon unseaworthiness?

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No. 84-923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CARNIVAL CRUISE LINES, INC.

Petitioner,

v.

ALBERT KORNBERG and LAURA KORNBERG,
His Wife,

Respondents.

BRIEF OF RESPONDENTS ALBERT KORNBERG AND LAURA KORNBERG, HIS WIFE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Albert Kornberg and Laura Kornberg, his wife, respectfully request that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion of the Court of Appeals, which reversed the Order of the District Court granting Summary Judgment to Carnival and which vacated the Order of the District Court Decertifying the Class Action and Denying Class Action and remanded the case to the District Court is reported at 741 F. 2d 1332 (11th Cir. 1984) and the Opinion thereof is reproduced in the Appendix to the Petition for Writ of Certiorari ("Appendix").

The Opinion of the District Court granting Carnival's Motion to Decertify the Class is reported at 1983 A.M.C. 2338 (S.D. Fla. 1983).

The Opinion of the District Court granting Summary Judgment in favor of Carnival is not reported.

Both Opinions are reproduced in the Appendix.

COUNTER-STATEMENT OF THE CASE

Plaintiffs Albert Kornberg and Laura Kornberg, his wife, were two of approximately 1,040 passengers who sailed aboard the SS Tropicale from Dodge Island, Florida on January 30, 1982 for a seven day cruise. The TSS Tropicale was a new passenger ship which had been delivered to the defendant in December of 1981. The vessel had sailed on two cruises before the cruise in question and on the previous two cruises there had been serious problems with the sanitary system aboard the vessel, a new type of system called an Evak system. The record is clear that the deplorable and inoperable condition of the toilets aboard the vessel was widespread and affected all of the passengers aboard the vessel for the cruise. The vessel's official records confirm the fact that these conditions had existed on the prior two voyages and that the defendant knew or should have known about these conditions. Under the circumstances defendant had an obligation to warn the prospective passengers so that they could make intelligent decisions as

to whether or not they wanted to sail aboard the vessel under these circumstances.

Since the class action was commenced by the Kornbergs within the 185 day notice provision set forth in the contract of passage, the numerosity requirement under the class action statute was certainly satisfied. The Court of Appeals also found properly that the typicality requirements under the Class Action Statute were also satisfied.

REASONS FOR DENYING THE WRIT

I. The Court Below Properly Interpreted and Followed the Decision of This Court in the American Pipe Case.

In the instant case the contract of passage contained a provision that notice of claim must be filed within 185 days. The class action in this case was commenced 24 days after the cruise ended on February 6, 1982. The Court below properly followed the holding of this Court in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974).

II. The Court Below Properly Found that the Plaintiffs Clearly Presented Claims Typical of the Class and, Therefore, Its Judgment Vacating the District Court's Order Decertifying the Class and Denying Class Action and Remanding was Proper.

The Court of Appeals for the 11th Circuit stated at the outset of the portion of its Opinion discussing the class action and the "numerosity" and "typicality" requirements of Fed. R. Civ. P. 23 (a)(1) and (2) that "That decision must be upheld unless it constituted an abuse of discretion. *Zeidman v. J. Ray McDermott & Co.*, 651 F. 2d 1030, 1038-39 (5th Cir. 1981)."

The Court then determined that the "numerosity" test was met and that the District Court failed to follow

the *American Pipe* case. The Court then discussed "typicality" and the standard to be used in determining "typicality" and stated: "Judged by this standard, plaintiffs clearly present claims typical of the class."

Since it is clear that the Court of Appeals was aware of the proper standard to be used and since the Court obviously determined that the District Court had abused its discretion, the decision of the Court of Appeals should not be disturbed.

III. The Court Below Properly Concluded that None of the Three Disclaimers Which the Petitioner Raised as Defenses to the Claim Applied in the Instant Case and that the District Court Erred in Granting Summary Judgment.

The Court of Appeals properly held pursuant to 46 U.S.C. Sec. 183 c that any attempt by the shipowner to disclaim liability for negligence is unlawful. The Court of Appeals properly found that the disclaimer of liability for any warranty of seaworthiness was irrelevant because the plaintiffs were not making any claim for breach of seaworthiness but were basing their claim on the shipowner's *failure to warn* which involves negligent conduct and which conduct under 46 U.S.C. Sec. 183 c cannot be avoided by contract. It is submitted that the Court of Appeals properly held that the disclaimers under the circumstances of this case would be void as against public policy and that the Court of Appeals properly followed the decision of this Court in *Liverpool and Great Western Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397, 9 S. Ct. 469, 32 L. Ed. 788 (1899).

As the Court of Appeals stated in its opinion (Appendix, p. 7): "It should be beyond debate that provision of an adequate sanitary system on a passenger boat is an 'essential function' for which a sea carrier cannot disclaim responsibility."

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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